Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 01-290
	)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF WORLD SATELLITE NETWORK, INC.

World Satellite Network, Inc. ("WSNet"), by its attorneys, hereby submits comments in the above-referenced proceeding.[1] In this proceeding, the Commission asks whether, pursuant to section 628(c)(5) of the Communications Act, as amended, section 628(c)(2)(D) should be renewed beyond its October 5, 2002, expiration.[2] Because meaningful competition does not yet exist in the vast majority of multichannel video markets and because competition would falter were the provision to sunset, WSNet urges the Commission to renew section 628(c)(2)(D) for an indefinite period.

Additionally, WSNet requests that the Commission deal with anticompetitive behavior by franchised cable operators and programming companies that are *de facto* vertically integrated pursuant to section 628(c)(2)(D). Finally, if the Commission believes that it requires additional authority to close a loophole in the statute by

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[1] Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, *Notice of Proposed Rulemaking*, CS Docket No. 01-290 (rel. Oct. 18, 2001)[hereinafter the "*NPRM*"].
[2] 47 U.S.C. §§ 548(c)(5) & (c)(2)(D).

expanding the proscriptions of section 628(c)(2)(D) to terrestrially-delivered programming, WSNet urges the Commission to work with the Congress to do so.

INTRODUCTION

WSNet competes in many multichannel video markets by offering a variety of services and technologies. WSNet's satellite platform is used to provide a unique, cost-effective, digital upgrade for smaller cable systems, particularly in rural areas. WSNet can deliver approximately 190 channels of high quality, digital video and audio programming to cable system operators at a fraction of the cost of traditional video delivery mechanisms.

In addition, WSNet continues to be a leading wholesale provider of analog television programming and equipment to private cable operators, multi-dwelling unit ("MDU") property owners, and wireless cable operators in the United States. As of May 31, 2001, WSNet served approximately 1,200 operators who collectively served over 800,000 video subscribers.

Because of its comprehensive presence in the multichannel programming industry, WSNet is keenly aware of the competitive benefits that have resulted from the application of section 628(c)(2)(D). At the same time, WSNet is aware that some companies have consciously evaded the strictures of section 628(c)(2)(D) by avoiding formal corporate vertical integration. Rather, such companies have operated in conjunction with various cable programming entities to become *de facto* vertically integrated through various non-equity relationships, whether at the board level, through unrelated joint ventures, or similar relationships. Such relationships and common interests have had the effect of creating the functional equivalent of vertical integration, all to the disadvantage of competitive multichannel video programming distributors ("MVPDs").

Finally, even when there is formal vertical integration, key cable companies have moved significant programming off satellite delivery, thereby attempting to evade the requirement that such programming be shared with competitors. This is being done consciously in contravention of the very purposes of section 628(c)(2)(D).

For all of these reasons, WSNet urges the Commission to maintain section 628(c)(2)(D), to enforce vigorously the other provisions of section 628 against *de facto* vertical integration, and to close the terrestrial delivery loophole, if necessary by working with the Congress to do so.

DISCUSSION

I. THE EXPIRATION OF SECTION 628(C)(2)(D) WOULD WORSEN AN ALREADY UNCOMPETITIVE MARKET.

A. The Multichannel Video Market Is Not Competitive.

As the Commission itself has concluded, the multichannel video market is not competitive.[3] Of the 33,000 cable communities nationwide, the Commission reports that only 330, or one percent, have effective competition.[4] As of June 2000, 80 percent of all subscribers to MVPD services still receive their programming from a franchised cable operator and 90 percent of these subscribers receive their cable from one of ten multiple-system operators ("MSOs").[5] As a result of the market dominance by cable companies, cable consumers continue to experience cable price hikes at rates 50 percent higher than inflation.[6]

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[3] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 16 FCC Rcd 6005, 6066 (2001) ("the market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry which serve to increase the cost of potential entry into a rival's market") [hereinafter, the "*Seventh Annual Report*"].

[4] *See id.* (defining effective competition by "consumers having a choice of more than one MVPD").

[5] *See id.* at 6013-14.

[6] From June 1999 through June 2000, cable prices rose 4.8 percent compared to a 3.2 percent increase in the Consumer Price Index. *See id*. at 6008-09.

MSOs also have managed, either through the sale or swap of territories, to cluster large numbers of cable communities so that various companies serve contiguous portions of the country. While such clustering purportedly is more efficient, these efficiencies have not been passed on to cable customers who typically pay more in clustered areas.[7]

Due in large part to the dominant position of franchised cable operators, non-franchised MVPDs continue to experience considerable difficulties in obtaining programming from both *de jure* and *de facto* vertically-integrated cable programmers and from unaffiliated programmers who continue to make exclusive agreements and engage in other unfair practices. Additionally, the continued regional clustering of the cable industry has allowed vertically integrated cable companies to avoid the program access obligations of section 628(c)(2)(D) by delivering more cable programming terrestrially. As a result, competitive MVPDs often cannot gain access to essential programming.

B. The Sunset of Section 628(c)(2)(D) Would Drive Competitors From the Market.

Despite the fact that the multichannel video market is far from being competitive, section 628(c)(2)(D) has had a beneficial effect. Particularly shortly after it was enacted, section 628(c)(2)(D) allowed various multichannel video providers to gain access to programming sufficient to offer a comparable, competitive alternative to franchised cable. More recently, the franchised cable industry and the major programmers have found ways to undermine the beneficial effect of section 628(c)(2)(D). Nonetheless, the provision continues to serve a vital function and the competitive outlook would worsen if it were to sunset.

As shown in the Commission's *Seventh Annual Report*, the nation's five largest MSOs own interests in 35 percent of all satellite delivered national programming

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[7] *See id.* at 6071.

networks.[8] While the total number of vertically integrated programming is less than in previous years, the consolidation of the cable industry has left fewer MSOs holding even more sizable stakes in the programming they offer.[9] Moreover, not only do the MSOs control numerous cable programming networks, they also control the majority of the popular, name-brand networks that form a necessary core of any competitive multichannel video service.[10]

If section 628(c)(2)(D) were permitted to expire, MSOs would be able to purchase additional programming networks without restraint and have enormous leverage in each of its markets to the detriment of existing competitive MVPDs.

C. The Sunset of Section 628(c)(2)(D) Would Chill Competitive Entry.

Not only would the sunset of section 628(c)(2)(D) drive current participants out of the market, it would likely keep most potential competitors from the market as well. Entry into the multichannel video market already requires considerable sunk costs. These costs would only be exacerbated by the cost of trying either to obtain programming from networks owned or controlled by the new entrant's competitors or attempting to create entirely new programming. Entry would especially be difficult if the potential new competitor were unable to acquire or were unable to afford programming, such as local sports competitions, that most potential subscribers demand.

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[8] *See id.* at 6078-6079 ("of the 281 networks, 99 networks, representing 35 percent, were vertically integrated with at least one cable MSO").

[9] For example, AOL Time Warner has an interest in 12 percent of all cable networks. Prior to splitting off Liberty Media Corp, AT&T held an interest in 23 percent of all cable networks. *See id.* at 6079.

[10] By number of subscribers and by primetime ratings, eleven of the top 20 video programming networks are vertically integrated with cable MSOs. *See id.* at 6079-80.

II. THE COMMISSION SHOULD ADDRESS ALL ANTICOMPETITIVE PROGRAMMING ARRANGEMENTS.

A. The Commission Should Act When There Is De Facto Vertical Integration.

As the Commission stated in its 1999 review of the cable attribution rules, the public interest requires it to review the actions of cable companies "when there is substantial evidence that the combined interests held are so extensive that they raise an issue of significant influence such that the Commission's multiple ownership rules should be implicated, notwithstanding the fact that these combined interests do not come within the parameters of the [attribution] rule."[11]

Similarly, with respect to program access, after a decade of the prohibitions of section 628(c)(2)(D), MSOs have managed to form various relationships that, while falling just short of the *de jure* vertical integration standards, have formed *de facto* vertically integrated relationships that have the anticompetitive effects that have raised the Commission's concern.

While MSOs have used their multifaceted relationships to enter into exclusive contracts and engage in other types of unfair practices that, if performed by vertically integrated MSOs, would violate section 628(c)(2)(D), the Commission has refused to investigate such *de facto* vertical integration, stating that it needs a "bright-line" attribution test to enforce its program access requirements.[12] As the *Seventh Annual Report* shows, however, the bright line test has not lessened the grip of the incumbent cable companies; franchised cable operators continue to expand control over cable programming and, therefore, cable markets, without triggering FCC enforcement of the program access rules.

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[11] *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission's Cable Attribution Rules, *Report and Order*, 14 FCC Rcd 19014, 19051 (1999).

[12] *See id.*

This anticompetitive behavior, however, is not without remedy. Section 628(b) prohibits cable operators from engaging "in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or customers."

While the Commission has held that section 628(b) will not be read in isolation to exclude mere exclusive contracts by non-vertically integrated cable companies, the provision may be used by the Commission "to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."[13] Because *de facto* vertical integration has emerged as a barrier to effective competition, it is just the type of conduct that should be precluded by section 628(b).

To be sure, one aspect of most *de facto* vertical integration is the use of exclusive contracts. But there are other types of conduct, such as anticompetitive marketing activities or restrictive contractual provisions, that should not be sheltered from the proscriptions of section 628(b). The Commission has the tools to deal with anticompetitive activities even if it has to go beyond a bright line test for *de jure* vertical integration.

B. If Necessary, The Commission Should Work With The Congress To Close The Terrestrial Loophole.

Many competitive MVPDs face considerable challenges in gaining programming from heavily clustered MSOs who are vertically integrated, but transport certain programming via terrestrial means, in an attempt to evade the requirements of section

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[13] Dakota Telecom, Inc., v. CBS Broadcasting, Inc., 14 FCC Rcd 10500, 10507 (1999), *citing* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, *First Report and Order*, 8 FCC Rcd 3359, 3374 (1993).

628(c)(2)(D). Such programming remains an integral part of the package of programming that competitive MVPDs need to compete with incumbent MSOs in local markets.

Not surprisingly, MSOs have denied that their use of terrestrial delivery of such programming is done to exclude competitors from access to local programming necessary to compete in local markets They claim that terrestrial delivery is a "common, cost-effective and legitimate method of delivering local and regional programming."[14] Yet, even if the MSOs are correct that terrestrial delivery is cost-effective, this does not alter the rationale behind making such programming available to competitors. In fact, but for the regulatory anomaly, the programming would be available to with competitive MVPDs.

The Commission has expressed an interest in protecting against such bypass of its rules and should do so without delay.[15] If, however, the Commission believes that it requires additional authority to close this loophole, WSNet urges the Commission to work with the Congress to change the statute by including such delivery explicitly in the proscriptions of section 628(c)(2)(D).

CONCLUSION

In the nine years since section 628(c)(2)(D) was promulgated, the multichannel video market has seen the entry and exit of dozens of competitors. Those that remain have done so in large part because of their ability to offer competitive alternatives to franchised cable operators. Section 628(c)(2)(D), which has allowed these competitive entrants access to most of the same programming as their franchised competitors,

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[14] Bill McConnell, "Programming access or excess?" *Broadcasting & Cable*, Oct. 8, 2001, at 16 (reporting comments of Comcast).

[15] *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, *Report and Order,* 13 FCC Rcd 15822 at 15856-7 ¶ 71 (1998).

remains an integral part of this competitive framework. At the same time, franchised companies have attempted to evade section 628(c)(2)(D) by relying on *de facto* vertical integration relationships and by shifting the delivery of programming to terrestrial facilities. Therefore, and for the reasons stated above, WSNet urges the Commission to renew section 628(c)(2)(D) for an indefinite period, to enforce section 628(b) against *de facto* vertical integration, and, if it deems necessary, to work with the Congress to close the terrestrial delivery loophole.

Respectfully submitted,

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December 3, 2001